

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33518

ROBERT HEIZELMAN,)	2008 Unpublished Opinion No. 484
)	
Petitioner-Appellant,)	Filed: May 29, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Elmore County. Hon. Michael E. Wetherell, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant. Eric D. Fredericksen argued.

Hon. Lawrence G. Wasden, Attorney General; Ralph R. Blount, Deputy Attorney General, Boise, for respondent. Ralph R. Blount argued.

PERRY, Judge

Robert Heizelman appeals from the district court's order summarily dismissing his application for post-conviction relief as untimely filed. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

The state charged Heizelman with grand theft and burglary in June 1999. Heizelman's appointed counsel filed a motion requesting a mental examination of Heizelman to determine whether he was able to assist in his own defense. On September 29, 1999, the district court found that Heizelman lacked fitness to proceed pursuant to I.C. § 18-212(2) and ordered Heizelman committed to the custody of the Department of Health and Welfare for no longer than ninety days. The proceedings resumed, and Heizelman pled guilty to grand theft on December 13, 1999. The state dismissed the burglary charge. On February 2, 2000, the district court

sentenced Heizelman to seven years, with a minimum period of confinement of two years, but retained jurisdiction for 180 days. After the end of the period of retained jurisdiction on July 10, 2000, the district court suspended the sentence and placed Heizelman on probation for ten years.

On February 7, 2003, the state alleged that Heizelman committed seven violations of the terms of his probation. On March 28, 2003, the district court issued an order again committing Heizelman to the custody of the Department of Health and Welfare for no longer than ninety days due to his mental health problems and inability to assist in his own defense. On March 31, 2003, Heizelman filed a pro se notice of appeal from his “conviction.” The district court resumed the proceedings in April 2003 based on an updated report from a doctor at the Department of Health and Welfare. On April 25, the district court held an evidentiary hearing and subsequently found that Heizelman committed six of the seven alleged probation violations. In August 2003, the district court ordered another mental health examination, and a mental health professional found that Heizelman was not competent. On April 5, 2004, the district court found Heizelman competent to proceed and held a disposition hearing where it revoked Heizelman’s probation and executed the original sentence. The district court issued a written order consistent with its oral ruling on April 8, 2004. The state moved to have dismissed as untimely the appeal from Heizelman’s “conviction” that he had filed on March 31, 2003, and on February 28, 2005, the Idaho Supreme Court dismissed the appeal.

On June 12, 2006, Heizelman, acting pro se, filed a verified pleading captioned “Petition for a Writ of Habeas Corpus,” which alleged claims regarding the underlying criminal proceedings leading to his conviction and sentence. Heizelman also filed a motion requesting counsel. The district court issued a notice of intent to dismiss Heizelman’s petition for writ of habeas corpus as an untimely application for post-conviction relief because it was filed over one year after the Supreme Court dismissed Heizelman’s appeal. The district court provided Heizelman twenty days to file a proper petition for writ of habeas corpus or an application for post-conviction relief. On August 16, 2006, Heizelman filed a pro se pleading captioned “Petition and Affidavit for Post Conviction Relief,” wherein he expressed the intent to incorporate the facts and claims alleged in his initial pleading and also alleged additional claims challenging his conviction and sentence, as well as the order revoking his probation. Heizelman also filed another motion requesting counsel. The district court summarily dismissed Heizelman’s post-conviction action on the grounds that the pleadings were untimely as an

application for post-conviction relief and asserted claims that could not be raised in a petition for writ of habeas corpus. Although the district court denied Heizelman's request for appellate counsel on the ground that the appeal was "frivolous," the Supreme Court subsequently appointed Heizelman appellate counsel. Heizelman appeals with the assistance of counsel.

II.

STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept

either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

III. ANALYSIS

On appeal, Heizelman asserts that the district court erred in dismissing his application as untimely without first ruling on his motion for appointment of post-conviction counsel. Heizelman concedes that his application was untimely filed after the statute of limitation period had run. According to Heizelman, however, his application alleged facts that raised the possibility of a valid argument for equitable tolling of the limitation period and the possibility of valid claims for post-conviction relief. Heizelman asserts that the district court should have appointed counsel to help him develop his claims.¹

If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111; *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). The district court abuses its discretion where it fails to determine

¹ Heizelman also asserted in his appellate brief that the district court erred to the extent that it treated his initial post-conviction pleading as a petition for writ of habeas corpus because the pleading was an application for post-conviction relief in substance. See *Abbott v. State*, 129 Idaho 381, 384, 924 P.2d 1225, 1228 (Ct. App. 1996). The state appears to agree, however, that the initial pleading was as an application for post-conviction relief. Additionally, Heizelman has not asserted how any mischaracterization of his initial pleading prejudiced his rights. Therefore, we need not further address this issue.

whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Id.* In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See id.*, at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

In the present case, the district court erred by failing to rule on Heizelman's motions for appointment of counsel prior to dismissing his application as untimely.² Heizelman asserts that we should remand this case to the district court for this error alone. The state asserts, however, that any error was harmless because Heizelman's pro se pleadings and affidavits failed to raise the possibility of a valid basis for post-conviction relief. In *Swader v. State*, 143 Idaho 651, 653, 152 P.3d 12, 14 (2007), the district court erred by not applying the proper standard when denying Swader's motion for appointment of counsel. The Supreme Court held that the issue was whether such error was prejudicial. *Id.* The Supreme Court addressed the issue of whether Swader's motion for appointment of counsel should have been granted under the standard announced in *Charboneau*. Likewise, the issue in this case is whether the district court's error was harmless, and we reject Heizelman's argument for an automatic remand. We must therefore

² We reject any assertion by the state that the district court ruled on Heizelman's motion for appointed counsel by "implicitly" concluding that the application was "frivolous" in the notice of intent to dismiss. In *Swader v. State*, 143 Idaho 651, 653, 152 P.3d 12, 14 (2007), the district court erred by *expressly* denying a motion for appointment of post-conviction counsel on the ground that the application was "frivolous" because that is not the proper standard. Thus, a district court may not implicitly deny a motion to appoint post-conviction counsel by deeming an application frivolous.

determine whether Heizelman alleged facts that raise the possibility of a valid argument for equitable tolling of the limitation period and the possibility of a valid claim for post-conviction relief.

In addressing the possibility of a valid argument for equitable tolling of the limitation period, we first note that the state is incorrect to the extent that it asserts Heizelman was required to articulate the theory of equitable tolling in the district court. The issue in this case is whether the district court erred in failing to appoint post-conviction counsel. A pro se applicant need only allege *facts* that would raise the possibility of a valid claim in order to be appointed counsel. See *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. Furthermore, this Court has previously rejected a pleading requirement to preserve an equitable tolling argument in a case where the applicant was appointed counsel in the trial court. See *Anderson v. State*, 133 Idaho 788, 792, 992 P.2d 783, 787 (Ct. App. 1999). This Court held that, although it would be prudent for an applicant to allege facts which he or she contends would avoid the time bar when an application is filed outside the one-year period specified in I.C. § 19-4902, the absence of such allegations in the initial pleading is not fatal to an applicant's claims. *Id.* Heizelman failed to raise an equitable tolling argument below in response to the district court's notice of intent to dismiss his action as untimely. Heizelman was not required, however, to argue the legal theory of equitable tolling below without the assistance of counsel in order to preserve for appeal his challenge to the district court's failure to rule on his request for counsel. We will thus examine the facts set forth in Heizelman's pleadings and affidavits and the evidence in the record to determine whether there is the possibility of a valid equitable tolling argument.

The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902(a). The appeal referenced in that section means the appeal in the underlying criminal case. *Freeman v. State*, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992). Where there has been a post-judgment motion or proceeding in a criminal action, the order entered on the post-judgment matter ordinarily does not extend the statute of limitation for a post-conviction action pertaining to the judgment of conviction or the original sentence. *Gonzalez v. State*, 139 Idaho 384, 386, 79 P.3d 743, 745 (Ct. App. 2003). Thus, the time for filing a post-conviction application challenging a judgment of conviction or sentence

does not start anew from the entry of a probation revocation order. *Id.* Rather, any post-conviction action filed within the limitation period connected to the probation revocation order, but beyond the limitation period measured from the appeal period for the judgment of conviction, may address only issues that arose from the probation revocation proceeding. *Id.*

The failure to file a timely application is a basis for dismissal of the application. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). Although a post-conviction applicant may be entitled to file after expiration of the limitation period if the applicant is entitled to equitable tolling, the bar for equitable tolling for post-conviction actions is high. *See Chico-Rodriguez v. State*, 141 Idaho 579, 582, 114 P.3d 137, 140 (Ct. App. 2005). *See also Evensiosky v. State*, 136 Idaho 189, 191, 30 P.3d 697, 969 (2001). The limitation period specified in I.C. § 19-4902 may be tolled where the applicant was prevented from timely filing his action by incapacitating mental illness or the effects of psychotropic medication. *See Chico-Rodriguez*, 141 Idaho at 581, 114 P.3d at 139; *Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996). In order for the statute of limitation under the UPCPA to be tolled on account of a mental illness, an unrepresented applicant must show that he or she suffered from a serious mental illness that rendered him or her incompetent to understand the legal right to bring an action within a year or otherwise rendered him or her incapable of taking necessary steps to pursue that right. *Chico-Rodriguez*, 141 Idaho at 582, 114 P.3d at 140. Equitable tolling will apply only during the period in which the applicant's mental illness actually prevented the applicant from filing a post-conviction action; any period following conviction during which the applicant fails to meet the equitable tolling criteria will count toward the limitation period. *Id.*

The district court entered Heizelman's judgment of conviction and sentence on February 3, 2000, but retained jurisdiction and subsequently placed Heizelman on probation on July 13, 2000. Generally, a notice of appeal from the district court must be filed with the clerk of the district court within forty-two days from the date evidenced by the filing stamp of the clerk of the court on the judgment, order, or decree appealed from. *See* I.A.R. 14(a). However, in a criminal case, the time to file an appeal is enlarged by the length of time the district court actually retains jurisdiction pursuant to Idaho Code, and the time to file commences to run when the court releases its retained jurisdiction or places the defendant on probation. *See id.* The district court placed Heizelman on probation on July 10, 2000. Thus, Heizelman was required to file an appeal challenging his underlying judgment of conviction or sentence by August 21,

2000, and the limitation period for Heizelman to file post-conviction claims challenging his underlying conviction and sentence expired on August 21, 2001. Additionally, Heizelman did not appeal the district court's written order revoking his probation on April 8, 2004, before forty-two days passed on May 20, 2004. Thus, the one-year limitation period to file post-conviction claims challenging the order revoking probation expired May 20, 2005. Heizelman did not initiate post-conviction proceedings challenging his judgment of conviction and sentence, and the order revoking probation, until he filed his pro se pleading captioned "Petition for a Writ of Habeas Corpus" in early June 2006. Therefore, the claims challenging Heizelman's conviction and sentence were filed almost five years after expiration of the applicable limitation period, and the claims challenging the order revoking probation were filed over one year after the expiration of the applicable limitation period.³

Although Heizelman's mental health problems are well documented, the record reveals no evidence that mental health problems prevented him from initiating a post-conviction action challenging his conviction and sentence in the year following the last day to appeal the order placing him on probation, August 21, 2000. Heizelman apparently had the capacity to comply with the terms of his probation from July 2000, when he was placed on probation, until early in

³ The district court appeared to rule that the pro se notice of appeal challenging the "conviction," filed on March 31, 2003, extended the time for Heizelman to file a post-conviction action. Heizelman adopts this reasoning on appeal. The Supreme Court dismissed the appeal in February 2005 as untimely. Because the notice of appeal was untimely as to any claims challenging the judgment of conviction and sentence, it did not extend the period for Heizelman to file post-conviction relief claims challenging his judgment of conviction and sentence. *See Loman v. State*, 138 Idaho 1, 2, 56 P.3d 158, 159 (Ct. App. 2002). Additionally, a notice of appeal must designate the final judgment, order, or decree appealed from. I.A.R. 17(e)(1). Heizelman's notice of appeal, however, does not challenge the order revoking his probation, which the district court entered after Heizelman filed the Notice of Appeal. Rule 17(e)(2) confers jurisdiction on an appellate court after the filing of a premature notice of appeal, but only where the trial court rules orally, the notice of appeal is then filed, and the trial court subsequently enters a written judgment. *State v. Payan*, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct. App. 1996). Heizelman's notice of appeal was filed prior to the district court's ruling, orally or in writing, on the alleged probation violations. Therefore, the district court erred to the extent it ruled that the notice of appeal filed March 31, 2003, extended the time for filing a post-conviction action. Although Heizelman's application was untimely as to all claims even under the district court's reasoning, ascertaining the correct dates for when the applicable limitation periods commenced is necessary for our analysis of whether Heizelman raised the possibility of a valid argument for equitable tolling.

2003, when the state alleged probation violations and the district court subsequently deemed him incompetent to assist in his defense. Indeed, a presentence investigation report dated March 31, 2004, indicates that Heizelman's probation officer stated Heizelman "was not taking any medications while on probation and was able to control his behavior up until around January 2003." Heizelman has not directed us to allegations or evidence to the contrary regarding this period of time and provides little argument regarding his mental incapacity during the time he was on probation. We hold that an attorney would not be able to help Heizelman develop a valid argument for equitable tolling for claims challenging his judgment of conviction and sentence, and he was not entitled to appointed counsel for those claims.

We next consider whether there is a possibility of a valid claim that Heizelman's mental health problems and medications rendered him incapable of initiating post-conviction proceedings during the period after the district court's order revoking probation. Specifically, Heizelman would need to demonstrate his mental health problems deprived him of an adequate opportunity to file a post-conviction application between the dates of May 20, 2004, when the one-year limitation period began to run until early June 2006, when he initiated post-conviction proceedings. *See Evensiosky*, 136 Idaho at 191, 30 P.3d at 969; *Chico-Rodriguez*, 141 Idaho at 582, 114 P.3d at 140. During the initial probation revocation proceedings in April 2003, defense counsel repeatedly asserted his belief that Heizelman was not competent to assist in his defense due to his mental health medications. Although the district court determined that Heizelman was competent to assist in his defense at the evidentiary hearing in April 2003, the district court then deemed Heizelman incompetent to assist based on a subsequent doctor's report and suspended the proceedings. The district court finally held the disposition hearing on April 5, 2004, and the minutes from that hearing indicate that defense counsel stated he believed Heizelman was still unable to assist in his own defense "at times."⁴ Heizelman's post-conviction pleadings and affidavits do not set forth any facts regarding his mental health status after the district court revoked his probation. Indeed, the record is devoid of any evidence or allegations regarding Heizelman's mental health status between when the district court revoked his probation and when he initiated post-conviction proceedings. In support of Heizelman's equitable tolling argument, appellate counsel thus relies on evidence of Heizelman's past mental health problems.

⁴ Although the minutes also indicate that defense counsel moved for creation of a transcript of the disposition hearing, the record before us does not contain a transcript of that hearing.

We conclude that evidence of Heizelman's past mental health problems does not raise the possibility of a valid argument that he was entitled to an enlarged limitation period that would extend over two years after the time for filing an appeal from the order revoking probation. Heizelman has a history of ongoing mental illness that has, at times, required incapacitating medication and rendered him incompetent to assist in his defense. At other times during the criminal proceedings, mental health professionals and the district court have found Heizelman competent to assist in his defense. The test for determining the competence of a criminal defendant to stand trial is different from the test to determine whether a post-conviction applicant's mental health problems prevented him or her from filing a timely application. *See Chico-Rodriguez*, 141 Idaho at 581, 114 P.3d at 139. However, Heizelman's past history of being competent to assist in his defense at times demonstrates that his mental health problems have been kept in check. The record does not indicate that Heizelman has ever been incapacitated for years at a time. Rather, the evidence suggests that, even during his worst periods, Heizelman has the capacity to recognize and assert his legal rights for significant intervals of time. We hold that the record does not reflect the possibility of a valid argument for equitable tolling as to claims challenging the order revoking probation and, therefore, the district court was not required to appoint post-conviction counsel to help Heizelman formulate such an argument.

IV. CONCLUSION

The district court erred in failing to rule on Heizelman's request for post-conviction counsel prior to summarily dismissing his post-conviction action. However, Heizelman has not raised facts sufficient to show that appointed counsel would be able to present a valid argument for equitable tolling of the limitation period to file post-conviction claims challenging the judgment of conviction and sentence or the limitation period to file claims challenging the order revoking probation. Because a court-appointed attorney could not have rendered Heizelman's post-conviction action timely, the district court's error was harmless. We therefore need not address whether the possible validity of any of Heizelman's claims required the district court to appoint counsel. We affirm the district court's order summarily dismissing Heizelman's application for post-conviction relief. No costs or attorney fees are awarded on appeal.

Chief Judge GUTIERREZ and Judge Pro Tem SCHWARTZMAN, **CONCUR.**

